

6

Docket No. GJE-13XC1D1C1
Serial No. 09/767,355Remarks

By way of the amendment of this date, claims 1, 14, 16, and 17 have been amended. Claims 23-48 are newly added. Therefore, claims 1-3 and 6-48 are now before the Examiner for consideration. The subject invention provides unique and advantageous animal feeds that increase the feed efficiency of animals and methods for increasing the feed efficiency of animals comprising the administration of the animal feeds of the instant invention. Certain of the claims have been amended for the purpose of expediting the patent application process in a manner consistent with the Patent and Trademark Office Patent Business Goals (P.B.G.), 65 Fed. Reg. 54603 (September 8, 2000), in order to lend greater clarity to the claimed subject matter, advance prosecution, and facilitate the business interests of Applicant. Support for these new claims and the amendments to the pending claims can be found throughout the subject specification. Favorable consideration of the claims now presented, in view of the remarks and amendments set forth herein, is earnestly solicited.

Claims 14-22 have been rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to point out and distinctly claim the subject matter regarded as the invention. The claims now indicate that the composition provides an amount of an organism that increases animal feed efficiency and it is respectfully submitted that this rejection is now moot. Reconsideration and withdrawal of the rejection is respectfully requested.

Claims 1, 3, 6, 8-11, 13-14, 17-17, 19, and 22 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Lewandowski *et al.* Applicant respectfully traverses.

The Office Action asserts that the claimed invention is anticipated by Lewandowski *et al.* on the grounds that the claimed method is anticipated by the teaching of the reference because the reference teaches the feeding of a solid edible biomass to animals. Applicant respectfully traverses. It is well settled law that, to anticipate a claim, the reference must teach an identical invention that is shown in as complete detail as is contained in the claim. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). Additionally, a claim is anticipated only if each and every element, as set forth in the claim, is taught by the reference. In the case of the instant invention, Applicant respectfully submits that the reference fails to meet the limitations of the claimed invention. For example, Lewandowski *et al.* fail to teach a solid feed selected from the group consisting of forage, cereal grain, grasses, legumes, crop residues, corn, sorghum, wheat, rye,

S:\SH-RESP\GJE\GJE-13XC1D1C1-Resp-2-Dec10-2002-OA.doc/DNB/sl

barley, oats, rice, cottonseed, gin trash, cotton processing byproducts, potato waste, citrus pulp, almond hulls, peanut hulls, bakery waste, wheat midds, and mixtures thereof. It is noted that the Office Action points to claim 19 as an indication that the reference teaches a solid biomass suitable to feeding to animals. However, it is respectfully submitted that the reference (and particularly claim 19) fails to teach that: 1) the solid biomass contains organisms in amounts that enhance the feed efficiency of animals; 2) that the solid biomass contains an added amount of organism as recited in the claims; or 3) that the solid biomass contains *L. kefir*. Indeed, the reference indicates that the organisms utilized are located in the effluent (liquid) that is treated according to the teachings of the reference not the flocculation product (*i.e.*, the "solid biomass"; see, for example, claim 1a), 1b), 1g); claim 17, last subparagraph; claim 19, last subparagraph). Accordingly, it is respectfully submitted that the subject invention is not anticipated by the claimed invention; reconsideration and withdrawal of the rejection is respectfully requested.

Claims 1-3, 8-18, and 22 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Cooke *et al.* Applicant respectfully traverses. The Office Action indicates that the reference anticipates the claimed invention on the grounds that it was known that *L. buchneri* was naturally present in silage and that the amounts of organism naturally occurring in the silage would be expected to fall within the broadly recited ranges provided in the instant claims. The rejection appears to argue that the claimed composition and method are anticipated because the reference inherently teaches each and every limitation of the claimed invention.

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic (*In re Rijckaert*, 9 F.3d 1531, 1534, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993) and, as indicated supra, a claim is anticipated only if each and every limitation of the claim is taught by the prior art reference. Furthermore, to establish inherency, extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999). Additionally, even if a claimed method comprises steps identical to those of a method taught in the prior art, and the same

result would have been achieved in the prior art method, the accidental or unwitting achievement of that result cannot constitute anticipation. See *In re Marshall*, 578 F.2d 301; 198 U.S.P.Q. 344 (C.C.P.A. 1978) and *In re Felton*, 484 F.2d 495, 500; 179 U.S.P.Q. 295, 298 (C.C.P.A. 1973).

In the case of the instant invention, it is respectfully submitted that the Cooke reference fails to anticipate the claimed invention because the reference fails to teach each and every material element of the claims; additionally, no extrinsic evidence has been provided that makes clear that the missing descriptive matter is necessarily present in the reference and that it would be so recognized by persons of ordinary skill. For example, the reference fails to teach any method of increasing feed efficiency in animals. Additionally, the reference is devoid of any recognition that the addition of *L. buchneri*, or related organisms, in the amounts recited provides for any increase in feed efficiency of animals. Finally, no extrinsic evidence has been provided that demonstrates that the missing descriptive matter is necessarily present in the reference and that one skilled in the art would have recognized it as such. Accordingly, it is respectfully submitted that the subject invention is not anticipated by the teachings of Cooke *et al.* and withdrawal of the rejection is respectfully requested.

Claims 1-3, 7, 10-11, and 14-18 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Alifimtsev *et al.* As is apparent from the teachings of the reference, only a single administration of a mixture of *L. plantarum* and *L. buchneri* is provided to chickens in the first days of life. The reference fails to teach multiple feedings of the bacterial composition to animals. Thus, it is respectfully submitted that the subject invention fails to anticipate the claimed invention and withdrawal of the rejection is respectfully requested.

9

Docket No. GJE-13XC1D1C1
Serial No. 09/767,355

In view of the foregoing remarks and amendments to the claims, Applicant believes that the currently pending claims are in condition for allowance, and such action is respectfully requested. The Commissioner is hereby authorized to charge any fees under 37 C.F.R. §§ 1.16 or 1.17 as required by this paper to Deposit Account No. 19-0065.

Applicant also invites the Examiner to call the undersigned if clarification is needed on any of this response, or if the Examiner believes a telephonic interview would expedite the prosecution of the subject application to completion.

Respectfully submitted,



Frank C. Eisenschenk, Ph.D.

Patent Attorney

Registration No. 45,332

Phone No.: 352-375-8100

Fax No.: 352-372-5800

Address: 2421 N.W. 41st Street, Suite A-1
Gainesville, FL 32606-6669

FCE/sl

Attachment: Marked-Up Version of Amended Claims

S:\SH-RESP\GJE\GJE-13XC1D1C1-Resp-2-Dec10-2002-OA.doc/DNB/sl

FAX RECEIVED
APR 10 2003
GROUP 1700

Received from <352 372 5800> at 4/9/03 3:41:08 PM [Eastern Daylight Time]

Docket No. GJE-13XC1D1C1

Serial No. 09/767,355

Marked-Up Version of Amended ClaimsClaim 1 (thrice amended):

1. A method for increasing the feed efficiency of animals comprising administering to the animals multiple feedings of a solid feed selected from the group consisting of forage, cereal grain, grasses, legumes, crop residues, corn, sorghum, wheat, rye, barley, oats, rice, cottonseed, gin trash, cotton processing byproducts, potato waste, citrus pulp, almond hulls, peanut hulls, bakery waste, wheat midds, and mixtures thereof comprising a feedstuff and an amount of an organism that increases the feed efficiency of said animals, wherein said organism is selected from the group consisting of *Lactobacillus buchneri*, *Lactobacillus kefir*, *Lactobacillus parakefir* and *Lactobacillus parabuchneri*.

Claim 14 (twice amended):

14. A solid feed comprising a solid feedstuff selected from the group consisting of forage, cereal grain, grasses, legumes, crop residues, corn, sorghum, wheat, rye, barley, oats, rice, cottonseed, gin trash, cotton processing byproducts, potato waste, citrus pulp, almond hulls, peanut hulls, bakery waste, wheat midds, and mixtures thereof and an amount of an organism, selected from the group consisting of *Lactobacillus buchneri*, *Lactobacillus kefir*, *Lactobacillus parakefir* and *Lactobacillus parabuchneri*, wherein said amount of organism that increases animal feed efficiency.

Claim 16 (twice amended):

16. The solid feed according to claim 14, wherein said solid feed comprises an said amount of organism that provides is administered in an amount of between 10^5 and 10^{14} colony forming units (CFU) per head per day.

Claim 17 (twice amended):

17. The solid feed according to claim 14, wherein said solid feed comprises an said amount of organism is that provides between 10^9 and 10^{10} colony forming units (CFU) per head per day.

SASH-RESP\GJE\GJE-13XC1D1C1-Resp-2-Dec10-2002-OA.doc/DNB/sl